Tri-Pak Machinery, Inc. formerly Tri-Pak Machinery Service, Inc. *and* International Brotherhood of Electrical Workers, Local Union 278. Case 16–CA–17827

April 23, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

The issue in this case is whether to defer the dispute to the parties' contractual grievance-arbitration machinery.

Upon a charge filed by the International Brotherhood of Electrical Workers, Local Union 278 (the Union), the General Counsel of the National Labor Relations Board issued a complaint on April 30, 1996, alleging that the Respondent, Tri-Pak Machinery, Inc., violated Section 8(a)(5) and (1) of the National Labor Relations Act, by refusing to meet and bargain with the Union in response to its request pursuant to a reopener provision in the parties' collective-bargaining agreement. The Respondent filed an answer admitting in part, and denying in part, the allegations of the complaint and asserting an affirmative defense that the complaint allegations should be deferred to the parties' grievance-arbitration procedure pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984).

On November 1, 1996, the General Counsel, the Respondent, and the Union filed a stipulation of facts and joint motion to transfer these proceedings directly to the Board. The parties agree that the charge, complaint, answer, and stipulation, with attached exhibits, shall constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties further agree that the stipulation has been entered into by them for the purpose of the above-entitled matters only. The parties waive a hearing before an administrative law judge, and agree to submit this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order.

On January 14, 1997, the Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondent filed briefs, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] The Respondent also moved to strike portions of the General Counsel's brief and exhibits. In view of our decision, we deny the Respondent's motion as moot.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Tri-Pak Machinery, Inc., a Texas corporation with an office and place of business in Harlingen, Texas, is engaged in the manufacture and retail sale of parts, machinery, and vaporizers. During the past 12 months, Respondent, in conducting its business operations, has purchased and received for use at its Harlingen, Texas facility goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Texas.

Accordingly, in agreement with the stipulation of the parties, we find that the Respondent is an employer in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. *Facts*

Since May 14, 1965, the Union has been certified as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Included: All production and maintenance employees, including the shipping clerk.
>
> Excluded: office clerical employees, professional employees (including salesmen), draftsmen, guards, and supervisors as defined in the Act.

Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period of February 16, 1993, to February 16, 1996. Each collective-bargaining agreement, including the most recent 1993–1996 agreement, contains the following provision:

> Either party desiring to change or terminate this Agreement must notify the other in writing, by certified mail, sixty (60) days prior to the termination date or on such anniversary termination date thereafter in any subsequent year. When notice is given for changes, the nature of the changes desired must be specified in the notice and the parties shall commence negotiations within such sixty (60) day period and this agreement shall continue in effect after said termination date until agreement is reached or until written notice is given by either party to terminate the Agreement.

The history of the parties' collective-bargaining relationship indicates that the Union had at one point initiated negotiations to modify the parties' then-existing collective-bargaining agreements by letters, submitting with those letters proposed modifications to the bar-

gaining agreement.[2] More recently, however, by letters dated May 3, 1983, April 18, 1989, and December 16, 1992, the Union initiated negotiations to modify the parties' then-existing collective-bargaining agreements, listing in those letters only the broad topics proposed for modification.[3] On each occasion, the Respondent engaged in negotiations following receipt of the letters, without raising any question as to the appropriateness of the process used by the Union.

By letter dated December 12, 1995, the Union requested that the contract be reopened to negotiate the following listed issues:

Article 16 Wages
Article 7 Vacations
Article 9 Hours and Overtime
Article 20 Bonus Insurance Plan
Article 23 Hospital Insurance
Article 24 Disability Insurance
Article 25 Effective Date and Termination

By letter dated December 18, 1995, the Respondent, through its attorney, cited the reopener provision of the contract and stated that the Union's December 12 letter ''does not set out the nature of the changes desired in a specific manner.'' The Union responded by letter dated January 3, 1996, proposing to reopen the contract only as to wages and the effective date, and specifying the proposed wage increase and the effective dates. By letter dated January 23, 1996, the Respondent reiterated that the December 12 letter did not constitute valid notice because it lacked specifics. The Respondent also contends that the January 3, 1996 letter, though more specific, also was invalid under the contract because it was not provided 60 days prior to the February 16, 1996 termination of the collective-bargaining agreement.

B. *Contentions of the Parties*

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union pursuant to its timely request, made in a form the Respondent has honored in the past. The General Counsel summarily argues that deferral to arbitration is inappropriate, ''where there is a substantial question as to whether a collective-bargaining agreement has been extended or automatically renewed.'' Accordingly, the General Counsel requests that the Board decide the case on the merits and find that the Respondent violated the Act as alleged.

The Respondent admits that it has refused to honor the Union's request to reopen the contract, but contends that the Union's request was not made in conformity with article 25 of the contract in that the Union did not specify the nature of the changes it sought. The Respondent disputes that the contract was modified by past practice but argues that, in any event, the dispute involves the interpretation of the collective-bargaining agreement and should be deferred to the parties' grievance and arbitration procedure.

C. *Discussion and Conclusions*

Contrary to the General Counsel, we find that deferral of the instant dispute is warranted. In *United Technologies Corp.*, 268 NLRB 557 (1984), the Board revived the ''deferral to arbitration policy expressed in *Collyer Insulated Wire*, above, and held that, where, as here, ''an employer and union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery.'' The Board, in *United Technologies*, stated that deferral is appropriate when the following criteria are present: the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well-suited to such resolution. *United Technologies*, 268 NLRB at 558.

We find that these deferral criteria are met in this case. Thus, the record shows that the Respondent and the Union have had a collective-bargaining relationship dating back to 1965, and there is no evidence that the Respondent is hostile to the exercise of protected statutory rights by its employees. The parties' grievance and arbitration provision broadly defines a grievance as ''a dispute, claim or complaint arising under and during the term of this Agreement'' and notes that it is ''limited to matters of interpretation or application of this agreement.'' Thus, the only restriction in the agreement over matters which may be submitted to arbitration appears to be that the disputes must involve interpretation of the contract. In agreement with the Respondent's contention, we find that the Respondent has raised an issue of contract interpretation and that the arbitration clause encompasses the complaint allegations. Finally, the Respondent has exhibited its willingness to submit to arbitration. Under these cir-

[2] This process was used in December 1976 and January 1980.

[3] The May 3, 1983 letter requested negotiations to change ''wages, benefits and working conditions''; the April 18, 1989 and December 16, 1992 letters summarily listed the articles it sought to reopen. In addition to the December 16, 1992 letter, the Union sent the Respondent a copy of a letter from the International president to the local business manager citing problems with the then-current agreement. The letter, dated January 18, 1993, stated that ''the issues mentioned in the enclosed letter are some of the issues the [Union] will be bringing to the bargaining table.''

cumstances, we conclude that the dispute is eminently well suited to resolution through that process.

We find no merit in the General Counsel's broad assertion that deferral to arbitration is inappropriate for questions regarding extensions or renewals of collective-bargaining agreements as to which the parties are in dispute. If there is no dispute about the existence of the contract containing the arbitration clause, and the clause, as here, broadly covers all disputes about contractual terms, then disputes concerning the renewal or termination of that contract are appropriate for arbitration. *Teamsters Local 70 v. Interstate Distributor Co.*, 832 F.2d 507, 510–511 (9th Cir. 1987). See also *Roadmaster Corp.*, 98 LA 847 (Christenson, 1992) (arbitrator decided issue whether employer's contractual notice to terminate contract was sufficient to forestall automatic ''rollover'').

Accordingly, we shall dismiss the complaint subject to the qualifications contained in the Order below.[4]

[4] Because the issue is not presented in this case, Members Fox and Liebman do not reach the question whether the standard set by *Olin Corp.*, 268 NLRB 573 (1984), prescribes too broad a class of cases in which the Board must defer. See, e.g., *Mobile Oil Exploration & Producing, U.S.*, 325 NLRB 176, 179 fn. 14 (1997).

Chairman Gould agrees with his colleagues that, pursuant to *Collyer Insulated Wire*, supra, deferral of the instant dispute is appropriate. See also *McDonnell Douglas Corp.*, 324 NLRB 1202, 1205 fn. 10 (1977). Further, Chairman Gould notes that, as a result of our deferral, the proceeding will remain subject to postarbitral review by the Board upon assertion by either party that either the arbitral proceedings or decision fail to satisfy the Board's requirements for postarbitral deferral under *Spielberg Mfg.*, Co., 112 NLRB 1080 (1955). For the reasons stated in his concurring opinion in *Mobile Oil Exploration & Producing, U.S.*, supra, in determining whether an arbitrator's award is not clearly repugnant to the purposes and policies of the Act under *Spielberg*, Chairman Gould would adhere to the more stringent standard in *Raytheon Co.*, 140 NLRB 883 (1963), that the award be consistent with Board precedent. Accordingly, he would reverse *Olin Corp.*, supra, to the extent that it weakens the ''clearly repugnant'' standard of *Spielberg* by ''not requiring an arbitrator's award to be totally consistent with Board precedent.'' *Olin*, 268 NLRB at 574.

ORDER

The complaint is dismissed, provided that the jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on the proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, been either resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.